Seema Development Sdn Bhd v Mah Kim Chye

HIGH COURT (IPOH) — SUIT NO 23–404 OF 1986
LEE SWEE SENG JC
30 AUGUST 2013

Civil Procedure — Setting aside — Ex parte order — Plaintiff granted ex parte order for leave to execute — Whether defendant ought to have appealed against order instead of applying to set it aside — Limitation — Whether application was made four years after 12 year period prescribed by the Limitation Act 1953 — Whether order ought to be set aside — Whether equitable principles would apply to extend limitation period — Limitation Act 1953 s 6(3)

The plaintiff applied for leave to execute on a judgment dated 17 October 1996 against the defendant. The ex parte application for leave to execute had been applied for nearly 16 years after the judgment was entered against the defendant. On 18 October 2012, the plaintiff was granted leave to execute on the judgment. This was the defendant's application to set aside the ex parte leave order and a stay of all execution that the plaintiff may have proceeded with pursuant to ex parte leave being granted. The defendant argued that the ex parte leave order that was granted was in breach of s 6(3) of the Limitation Act 1953 ('the Act'). The plaintiff raised a preliminary objection to the defendant's application. The plaintiff submitted that the defendant ought to have appealed against the ex parte leave order instead of applying to set it aside. The plaintiff submitted that in the circumstances of the case, equitable principles would apply to assist it by extending the 12 year limitation period prescribed by the Act.

Held, allowing the defendant's application:

(1) The plaintiff's preliminary objection was misconceived in the light of O 32 r 6 of the Rules of Court 2012 ('ROC'), which clearly provides that the court may set aside an order made ex parte. The ex parte leave order granted to the plaintiff to execute on the judgment had been made without the defendant having had an opportunity to be heard and to oppose the plaintiff's application for leave to execute on the judgment. Such an ex parte order could always be set aside on meritorious grounds. An appeal would only be necessary and an appropriate mode of setting aside the order for leave if both sides had been heard in an inter parte application (see paras 9 & 11).

(2) The plaintiff's application for leave to execute the judgment was an action on a judgment and hence subject to the limitation of 12 years

under s 6(3) of the Act. There was no statutory exception to this rule, thus the strict limitation period of 12 years could not be extended (see paras 16–17).

(3) The plaintiff had not provided cogent reasons as to why the defendant could not rely on s 6(3) of the Act, when it had not bothered to proceed within the time frame prescribed and proscribed by both the ROC and the Act. The plaintiff had been unable to refer to any case where leave had been granted to a judgment creditor to proceed with execution on a judgment, after a lapse of 12 years. There were also no extenuating circumstances to justify the excuse of not enforcing the judgment earlier within the 12 year period (see paras 31–32).

[Bahasa Malaysia summary

Plaintif memohon kebenaran untuk melaksanakan satu penghakiman bertarikh 17 Oktober 1996 terhadap defendan. Permohonan ex parte bagi kebenaran melaksanakan penghakiman tersebut telah dibuat hampir 16 tahun selepas penghakiman dimasukkan terhadap defendan. Pada 18 Oktober 2012, plaintif diberikan kebenaran untuk melaksanakan penghakiman tersebut. Ini adalah permohonan defendan untuk mengetepikan perintah kebenaran ex parte dan bagi penangguhan kesemua pelaksanaan yang mana boleh diteruskan oleh plaintif sekiranya kebenaran ex parte diberikan. Defendan menghujahkan bahawa perintah kebenaran ex parte tersebut melanggar s 6(3) Akta Had Masa 1953 ('Akta'). Plaintif membangkitkan bantahan awalan terhadap permohonan defendan. Plaintif menghujahkan bahawa defendan sewajarnya merayu terhadap perintah kebenaran ex parte tersebut dan bukan memohon untuk mengenepikannya. Plaintif menghujahkan lagi bahawa dalam hal keadaan kes ini, prinsip-prinsip berasaskan ekuiti terguna pakai dalam membantunya melanjutkan tempoh had masa 12 tahun yang diperuntukkan oleh Akta.

Diputuskan, membenarkan permohonan defendan:

(1) Bantahan awalan plaintif adalah satu salah tanggapan berdasarkan pada A 32 k 6 Kaedah-Kaedah Mahkamah 2012 ('KM'), yang mana jelas memperuntukkan bahawa mahkamah boleh mengenepikan satu perintah yang dibuat secara ex parte. Perintah ex parte yang diberikan kepada plaintif untuk melaksanakan penghakiman tersebut telah dibuat tanpa defendan mendapat peluang untuk didengar dan untuk menentang permohonan plaintif bagi kebenaran untuk melaksanakan penghakiman. Perintah ex parte sedemikian sentiasa boleh diketepikan atas alasan-alasan bermerit. Satu rayuan menjadi perlu dan cara yang wajar untuk mengetepikan perintah kebenaran jika kedua-dua pihak telah dibicarakan dalam permohonan inter parte (lihat perenggan 9 & 11).

(2) Permohonan plaintif bagi kebenaran melaksanakan penghakiman adalah satu tindakan ke atas penghakiman dan oleh itu tertakluk kepada had masa 12 tahun di bawah s 6(3) Akta. Tiada pengecualian statutori bagi aturan ini, oleh itu had masa ketat dalam tempoh 12 tahun tidak boleh dilanjutkan (lihat perenggan 16–17).

(3) Plaintif tidak memberikan alasan-alasan jelas mengapa ia tidak boleh bersandarkan pada s 6(3) Akta, sedangkan ia tidak meneruskan dalam had masa yang ditetapkan dan diperuntukkan oleh kedua-dua KM dan Akta. Plaintif tidak dapat merujuk pada mana-mana kes yang mana kebenaran diberikan kepada penghutang penghakiman untuk meneruskan dengan pelaksanaan penghakiman, selepas luput tempoh 12 tahun. Tidak terdapat juga hal keadaan peringan untuk memberi justifikasi kepada alasan kerana tidak menguatkuasakan penghakiman tersebut lebih awal dalam tempoh 12 tahun (lihat perenggan 31–32).]

Cases referred to

AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal [2013] 3 MLJ 179, FC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Chow Seek Kai v Allied Capital Sdn Bhd [2010] 1 LNS 201, HC (refd)

Daud v Ibrahim [1961] 1 MLJ 43, CA (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223, CA (refd)

Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610, CA (refd)

Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156; [1982] CLJ 298; [1982] CLJ (Rep) 190, FC (refd)

Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221 (refd)

Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors [2013] 3 MLJ 299; [2012] 3 CLJ 499, HC (refd)

Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors [2010] 2 MLJ 661, CA (refd)

Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors) [2004] 3 MLJ 301; [2004] 3 CLJ 131, CA (refd)

Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651; [1998] 4 CLJ 812, CA (refd)

Tan Kok Chuan v Liew Nam Foong [2000] MLJU 76, HC (refd)

Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479; [2000] 1 CLJ 553, CA (refd)

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561; [2001] 2 CLJ 31, CA (refd)

Legislation referred to

Limitation Act 1953 s 6(3)
Limitation Ordinance 1953
Rules of Court 2012 O 32 r 6, O 46 rr 2(1)(a), 3, 3(1)
Rules of the High Court 1980 O 46 r 2

T Manoharan (Krish Mano & Associates) for the respondent/plaintiff.
Adam Teoh Kwok Wai (Iruthaya Raj with him) (Ng Choo Beng R Naidu & Partners) for the applicant/defendant.

Lee Swee Seng JC:

[1] This is a 1986 case. One might wonder why there is still anymore application filed concerning the matter. The reason is this: Though a monetary judgment had been entered by the plaintiff against the defendant dated 17 October 1996, no execution had been proceeded with. It was only on 18 October 2012 that the plaintiff managed to get an ex parte order for leave to proceed with execution against the defendant.

[2] Upon been served with the ex parte order for leave, the defendant duly applied by a notice of application dated 14 December 2012 to have the order set aside.

THE PROBLEM

[3] The problem is that not only more than six years have passed since the judgment was entered on 17 October 1996, more than 12 years have passed too. Indeed some 16 years have passed from the date of the judgment to the date of the filing of the ex parte application in 22 August 2012 for leave by the plaintiff to execute the judgment which ex parte leave was granted on 18 October 2012.

[4] The plaintiff in the ex parte application in encl RF3 had applied for the following orders:

(a) that the plaintiff be granted leave to execute on a judgment dated 17 October 1996 against the defendant;

(b) that the plaintiff be granted leave to claim interest at the rate of 8%pa as stated in the judgment dated 17 October 1996 from 16 November 1986 till 17 October 1996;

(c) that the plaintiff be granted leave to claim interest at the rate of 8%pa for 6 years from 17 October 1996 till 17 October 2002; and

(d) that costs of this application be costs in the cause.

A THE PRAYER

[5] The defendant applied in encl RF10 dated 14 December 2012 to set aside the ex parte leave order granted on 18 October 2012. The defendant also applied for stay of all execution that may have been proceeded by the plaintiff pursuant to the ex parte leave granted.

B

[6] The defendant argued that the ex parte leave granted is in breach of s 6(3) of the Limitation Act 1953.

C THE PRINCIPLE

Whether the defendant ought to have appealed against the ex parte order for leave granted on 18 October 2012

D

[7] Apparently the application by the plaintiff for leave to execute on the judgment was brought under O 46 r 3 of the Rules of Court 2012 ('ROC') because of the requirement set out in O 46 r 2(1)(a) of the ROC which provides that:

E

> A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:
>
> (a) where six years or more have lapsed since the date of the judgment or order.

F

[8] Under O 46 r 3(1) of the ROC it is provided that an application for leave to issue a writ of execution may be made ex parte by a notice of application in Form 88.

G

[9] The plaintiff contended that the defendant ought to have appealed against the ex parte order for leave as the leave was granted after hearing the merits of the plaintiffs application. Such a contention is misconceived. O 32 r 6 of the ROC is clear: It provides that the court may set aside an order made ex parte.

H

[10] In *Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors* [2010] 2 MLJ 661 at p 670 it was held that:

I

> (d) Order 32 r 6 of the RHC states that the court may set aside an order made ex parte. This rule is a good piece of legislation because it protects the basic right of the litigants in that the party who has not been heard may apply to the court to have that order discharged forthwith (*Boyle v Sacker* (1888) 39 Ch D 249 at p 251; *Note Becker v Noel & Anor* [1971] 1 WLR 803 CA); and *Tan Poey Kheng v Ma PengKiat* [1984] 1 MLJ 58)

…

[11] There is no doubt whatsoever that the ex parte leave order had been made without the defendant having had an opportunity to be heard and to oppose the said application. Like all ex parte applications, an order so made may always be set aside on meritorious grounds. An appeal would only be necessary and an appropriate mode of setting aside the order for leave if both sides have been heard in an inter parte application.

[12] Therefore the preliminary objection raised by the plaintiff is without merits and I had dismissed it.

Whether the application for leave to execute on a judgment after 12 years ought to be set aside.

[13] Section 6(3) of the Limitation Act 1953 is clear. It reads:

> Section 6 Limitation of actions of contract and tort and certain other actions.
>
> (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[14] The leave to execute has been applied for nearly 16 years after the judgment was entered. It is four years after the expiry of the 12 years prescribed by the Limitation Act 1953. There is no statutory exception to this. Some leeway is given if the leave to execute is applied for after six years and before the expiry of 12 years from the date of the judgment.

[15] In *Daud v Ibrahim* [1961] 1 MLJ 43 at p 44, the Court of Appeal held, speaking through Good JA, as follows with respect to the relevant provision in the Limitation Ordinance 1953:

> … the purpose of the proceedings commenced by the summons-in-chambers here was to obtain execution of a judgment. Such proceedings must, under the Kedah Limitation Enactment (No 60) which was repealed on February 18, 1953 be brought within twelve Muslim years from the date of the judgment; and, under the Limitation Ordinance, 1953 which came into force on February 19, 1953, within twelve Gregorian years from the date on which the judgment became enforceable.

[16] In the recent Federal Court case of *AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal* [2013] 3 MLJ 179, His Lordship Ahmad Maarop FCJ held that eventhough a bankruptcy action is not

a mode of execution within the meaning of O 46 r 2 RHC, yet it is still an action on a judgment and hence subject to the limitation of 12 years under s 6(3) of the Limitation Act 1953. His Lordship opined as follows at p 209–210:

> [62] It is clear from the aforesaid judgment that a bankruptcy proceeding is not a writ of execution within the meaning of O 46 r 2 of the RHC 1980, and that unlike execution which is the continuation of the existing proceeding to enforce a judgment provided by RHC 1980, bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disabilities, the most important being the loss of control over his properties to the official assignee. Unlike an execution proceeding, a bankruptcy proceeding bears the characteristics of a fresh proceeding. Thus a bankruptcy proceeding is an action caught by the provision under s 6(3) of the Limitation Act 1953. It is an action upon a judgment, ie, an action to enforce a judgment. Such being the case O 46 r 2 of the RHC does not apply. Since a bankruptcy proceeding is an action upon a judgment within the meaning of s 6(3) of the Limitation Act 1953, and limitation for bringing the action is 12 years, a judgment creditor is entitled to enforce a final judgment by instituting bankruptcy proceeding without the leave of the court within that period of twelve years. In other words, if the judgment creditor institutes a bankruptcy proceeding (to enforce a final judgment) within that 12 year period, he 'shall be deemed to be a creditor who has obtained a final judgment or final order' within the meaning of s 3(1)(i) of the BA 1967. Further, in our view, since O 46 r 2 of the RHC does not apply to bankruptcy proceeding, there is no reason or justification to use it to read into the phrase, 'execution thereon not having been stayed' in s 3(1)(i) of the BA 1967, the implication that in addition to there being no stay of execution by the court, the creditor must be in a position to issue immediate execution. The only bar for the institution of bankruptcy proceeding is the limitation under s 6(3) of the Limitation Act 1953.

[17] A fortiori, an execution process for which leave is required would also be subject to the limitation of 12 years under s 6(3) of the Limitation Act 1953. There is no statutory exception to this. In *Daud v Ibrahim*, the delay was 12 years and five days after taking into account the moratorium period because of the World War II. Yet the court did not because the court could not extend the strict limitation period of 12 years where no exception has been provided for.

Whether in the circumstances of the case equitable principles apply to extend the period of 12 years under s 6(3) of the Limitation Act 1953

[18] Mr T Manoharan cited the principles set out by His Lordship Dr Hamid Sultan J in *Chow Seek Kai v Allied Capital Sdn Bhd* [2010] MLJU 904; [2010] 1 LNS 201:

… In the instant case and on the facts, the doctrine of estoppel must be considered in the right perspective, failing which it will lead not only to miscarriage of justice but also scandalize court proceedings and will stand to prove that delay by the courts defeated a substantive right of the petitioner. As in this case the petitioner cannot be faulted for any delay. And the delay if any was orchestrated by the respondent who did not produce any evidence to show that they had taken all steps to prosecute their appeals etc expeditiously. It is now well settled that the doctrine of estoppels will assist the petitioner to preserve its right notwithstanding the Limitation Act. Support for the proposition is found in a number of cases:

(a) The Federal Court in the case of *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Berhad* asserted that the doctrine of estoppels is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed the circumstances in which the doctrine may operate are endless …

(e) In *Othman & Anor v Mek* [1972] 2 MLJ 158 (FC): Statutes of limitation which bar the enforcement of a right by action are rules of procedure only: see 24 Halsbury, (3rd Ed) p 181. A right which becomes unenforceable merely by reason of limitation does not ipso facto perish or vanish into thin air: see *Holmes v Crowther* [1970] 1 WLR 835 where it was held that, although under section 18(5) of the Limitation Act, 1939, arrears of mortgage interest outstanding for more than six years are irrecoverable by action, the mortgagors nevertheless were only entitled to the equitable remedy of redemption provided that they paid all arrears of mortgage interest, whether statute-barred or not. If, as in that case, equitable rights did not perish by reason of limitation, can this same defence be set up here to deny the rights of a beneficial owner to be granted his claim to the legal title?" …

(f) What Edgar Joseph JR, J (as he then was) said about the above dicta in *Kok Hoong v Leong Cheong Kweng Mines Ltd* when he decided *Alfred Templeton v Low Yat Holdings Sdn Bhd* is noteworthy:

These words are widely drawn and suggests that the Limitation Act can give way to estoppels. Indeed there are dicta in *Tuberville v West Ham Corporation* [1950] 2 KB 208 which suggest that a defendant will not be heard to rely on a statute of limitation if his acts or statements during the currency of the period induced the plaintiff to delay proceedings.

[19] Learned counsel for the plaintiff also referred the court to *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651 p 664; [1998] 4 CLJ 812 p 824 His Lordship Gopal Sr Ram JCA (later FCJ) observed that:

Based on the foregoing evidence it has been argued before us by the defendant that the plaintiff ought not to be permitted to rely on limitation to defeat the defendant's right to the monies in question because it would be inequitable to do so. In support

of this argument, counsel relied upon the following passage in the judgment of this court in *Sia Siew Hong v Lim Gim Chian* [1995] 3 MLJ 141; [1996] 3 CLJ 26, at pp 155–156:

> The doctrine of estoppel — whether one calls it promissory estoppel, estoppels by encouragement or estoppel by convention does not really matter — has reached such a stage that it may be used to deprive a litigant of the benefit of a procedural statute such as the Limitation Act 1953. The law upon this subject has been stated by Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at pp 244–245. A reading of His Lordship's judgment in that case has left mewith the impression that little or nothing may be usefully added to the learning contained therein.
>
> Another way of stating the doctrine when applying it to written law is comprised in the maxim 'equity will not permit statute to be used as an engine of fraud'. It is a doctrine of wide operation. Its content was explained by Mohamed Azmi SCJ in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 at p 296 in the following words:
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> It is not a fraud in the common law sense, but an unmeritorious and unconscionable conduct which is known as constructive or equitable fraud (see *Spry on Equitable Remedies* (2nd Ed) at p 236).

[20] The doctrine, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statutory provision that would defeat his opponent's case. An application of the doctrine requires a meticulous examination of the facts and circumstances of the particular case to determine whether there has been any inequitable conduct. The doctrine has been applied to several statutes, including those governing contracts, wills, trusts and assignments. The categories of statutes to which the doctrine may be applied are not closed and I am certainly unable to find any serious impediment in applying it to bar a litigant from raising and relying upon the provisions of the Limitation Act 1953. In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, at p 344 the Federal Court observed as follows:

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless. Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1953.

[21] Learned counsel for the plaintiff admitted that there was nothing on the

part of the defendant that could be said to be delaying or inducing the plaintiff to delay the execution of the judgment taken. The defendant did not do anything to prevent the plaintiff from proceeding with execution. Even if the defendant has emigrated to Australia, there was still nothing preventing the plaintiff from enforcing the judgment there. If that be the case then there is no place for the application of the equitable doctrine of estoppel to extend the strict statutory time limit of 12 years within which execution must proceed against a judgment taken.

[22] The plaintiff in its affidavit attributed the delay to its precious solicitors on record who had a problem with his practising certificate and was finally suspended from practice. Whilst the court would generally try to shield an innocent client from receiving the full brunt of the mistakes of his solicitors, yet it cannot be denied that solicitors are agents of clients and their actions or inactions would bind the clients. The recourse of a client who suffers as a result of the action or inaction of his solicitors would be to take legal action against the solicitors concerned. More so in this case where the plaintiff has not shown the steps it has taken to follow-up with the instructions which it said it has given to its solicitors. Whilst delay of six years may be understandable and excusable under some circumstances, a delay of 16 years without explaining what happened in each of the intervening year after the first six years would not suffice. The court cannot assist a client who has not shown reasonable diligence in following through with the instructions given to his solicitors.

[23] The Court of Appeal speaking through His Lordship James Foong FCJ in *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh Bin Mamat & Ors* [2009] 4 MLJ 610 at pp 631–632 had admonished as follows where blame was sought to be placed on one's previous counsel for his inaction:

> [21] This excuse offered by the defendants seem to lay the blame on an employee engaged by the defendants' solicitors who failed to enter into the diary the hearing date. But an employer is responsible for the action of his employee and so is the conduct of the defendants' solicitors binding the defendants. Undoubtedly, such callous act of the defendants' solicitors speaks very poorly of them. And such excuse has for the last decade become a common feature for an applicant to convince the court into granting him a retrial. But from authorities (*Mohd Yusof Mohamad v Electrolux Home Centers Sdn Bhd* [1999] 2 CLJ 866; *Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors* [1991] 1 MLJ 111; [1990] 1 CLJ (Rep) 606) such excuse has not been tolerated.

[24] The plaintiff quoted the case of *Ng Kim Moi v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors) & Ors* [2004] 3 MLJ 301; [2004] 3 CLJ 131 where His Lordship Gopal Sri Ram JCA (later FCJ) at pp 319–320 (MLJ); 150–152

(CLJ) in a minority judgment opined as follows on non-compliance with procedure and the substantive justice of the case:

> The position then is this. The appellants have made out a clear case of deprivation of their land in violation of the provisions of written law. But, because of the way in which their pleading has been settled, they are not entitled to the principal reliefs they claim. Does it then follow that they are to leave the precincts of this court bereft of any remedy for the wrong they have suffered? If that be so then there is something terribly wrong with our justice system. But I do not apprehend that to be the case. The law is not so impotent that it will let an injustice pass by while having its limbs bound by procedural technicalities. As Ong Hock Sim FJ said in *Othman v Mek* [1972]2 MLJ 158 at p 165:
>
> … it is the duty of the courts to exercise the utmost diligence in applying the maxim ubijus ibi remedium, so that justice shall be done, unless we are strictly constrained by law to uphold any decision which results in injustice.

[25] The attitude of our courts to legal technicalities is summed up in the following passage in the judgment of Ahmad Fairuz JCA (now Chief Justice) in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561; [2001] 2 CLJ 31 where His Lordship collected the authorities on the subject:

> Our Federal Court in the case of *Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 at p 189 said:
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> The Rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice. In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities. But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice. This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear* [1907] 1 KB 12:
>
> Although a court cannot conduct its business without a code of a procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; *and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.*(Emphasis added.)
>
> And in the same case, Ali FJ, said (at p 192):
>
> The general principle, I think, is that rights of parties in an action are not to be defeated by technical objections.
>
> In this connection, we would also like to quote what this court had said in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, at p 342, ie:

A … After all, courts exist to do justice according to the law as applied to the *substantial merits* of a particular case … (Emphasis added.)

Kaikaus J, in *Imtiaz Ahmad v Ghulam AH PLD* 1963 SC 382 at p 400 said:

B Any system which by giving effect to the form and not to the substance *defeats substantive rights is defective to that extent*. The ideal must always be a system that gives to every person what is his. (Emphasis added.)

Bearing in mind the abovementioned authorities, I feel that the preliminary objection should not be allowed. The objection is indeed on a mere technicality.

C

[26] So, the fact that a plaintiff claims the wrong relief or does not claim the correct relief does not bar the court from granting the relief appropriate to the particular circumstances to prevent injustice by acting under the prayer for further or other relief. Thus, in *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] D 2 MLJ 156; [1982] CLJ 298; [1982] CLJ (Rep) 190, Salleh Abas FJ (as he then was) said:

We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors, who were not up-to-date with this aspect E of legal technicalities. In any case prayer (e) in paragraph (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning.

[27] Further in *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ F 479 at p 483; [2000] 1 CLJ 553 at p 556 His Lordship Gopal Sri Ram JCA (later FCJ) observed with compassion as follows:

This case demonstrates the terrible harm that may be visited upon the litigant's head because of his solicitor's mistake. We hasten to add that the solicitor concerned is no G longer on record in the proceedings before us.

Whenever possible; where there is no risk of sacrifice of principle in the name of justice or at the altar of convenience; we do our best to ensure that a lay client does not suffer because of the mistake of his legal advisers. We do so in the interests of justice. When we act, we always bear in mind what Lord Denning said in *Doyle v* H *Olby Ltd* [1969] 2 All ER 119 at p 121:

We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of the evidence, in which case we can best order a new trial. I

[28] However there are limits to what may be done in the interest of justice when there has been contumelious conduct on the part of a litigant who could

not care less. The above dicta must be held in a balance with another prior dicta of His Lordship Gopal Sri Ram JCA (later FCJ) in the strictures issued in the case of *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 which are worthy of repetition lest we apply to extreme that every delay is curable even when there is no valid justification for it other than pure indolence that can only invite an indictment from the court. When delivering the judgment for the Court of Appeal His Lordship dealt with the point of delay as follows at p 229:

> The delay point
>
> It is a cardinal principle of law, that *when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously.* The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debitojustitiae*, *a court may refuse relief to an indolent litigant.*
>
> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.
>
> The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30. It is a decision of the Federal Court and therefore quite plainly binds this court There, Edgar Joseph Jr FCJ, said (at p 36):
>
> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justicie, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (see O 2 r 2(i) of the Rules of the High Court 1980.) (Emphasis added.).

[29] In determining whether the explanation given in *Khor Cheng Wah's* case was reasonable His Lordship Gopal Sri Ram JCA (as he then was) said thus at pp 229–230:

> In the present case, the explanation of the fourth defendant for the delay in making his explanation is, to summarise his affidavits, that *he placed the conduct of his defence in the hands of a solicitor who did little to protect his client's interests.*
>
> Is that a reasonable explanation? The learned judge did not think it was. And I agree with him. Undoubtedly, this court will not, whenever feasible, allow a client to suffer for the negligence of his solicitor: see *Cheow Chew Khoon v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ at p 490 per VC George JCA. *But there are limits to*

what may be done in the interests of justice. After all, justice is not only for a defaulting defendant: it is for the plaintiff as well. And at the end of the day, a careful examination of the facts and circumstances reveals that *the fourth defendant did nothing to communicate with his solicitor at any earlier point in time to discover the state in which the litigation against him stood. Surely, it would be injustice to visit the consequences of his indifference upon the plaintiff's head.* (Emphasis added.)

[30] Likewise s 6(3) of the Limitation Act 1953 gives the judgment debtor a right to invoke it to insulate himself against further enforcement proceedings against him. There is no good reason here to bend the law to allow for execution after 16 years when the plaintiff as a judgment creditor has not bothered to proceed within the time frame prescribed and proscribed by both the Rules of Court 2012 and the Limitation Act 1953. The plaintiff also referred to the case of *Malayan Banking Bhd v Chong Hin Trading Sdn Bhd & Ors* [2013] 3 MLJ 299; [2012] 3 CLJ 499 where it was observed as follows:

[13] The way a court of law is to exercise its discretion is captured in the dicta of His Lordship Chang Min Tat FJ in the Federal Court case of *Tio Chee Hing v Chung Khiaw Bank Ltd* [1981] 1 MLJ 227 as follows:

The court has a discretion in the matter and may exercise its discretion in favour of the applicant if satisfied that he is entitled to issue execution and with the cause or causes of the delay, pp 304–305 (MLJ); p 504 (CLJ).

[16] The Court of Appeal in the case of *Affin Bank Bhd v Wan Abdul Rahman Wan Ibrahim* [2003] 2 MLJ 509; [2003] 1 CLJ 826 appreciated that a sufficient and reasonable reason to support an application for leave will vary from case to case and it is impossible for court to provide an exhaustive list of what is considered to be sufficient reason, p 505.

[28] The plaintiff's counsel also drew the court's attention to the case of *Alfred Templeton & Ors v Mount Pleasure Corp Sdn Bhd* [1989] 2 MLJ 202; [1989] 1 CLJ 693wherein the court decided that a defendant will not be heard to rely on a statute of limitation if his acts or statements during the currency of the period have induced the plaintiff to delay proceedings, p 308 (MLJ); p 508 (CLJ).

[30] Such a conduct of the most unkindest cut of all is unfortunately not without precedent. His Lordship Richard Malanjum J (as the present CJSS was then) in the case of *Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise (sued as a firm)* [2002] 6 MLJ 579; [2002] 4 AMR 4903 observed in a case not too dissimilar to the present case as follows:

This is not a case where the plaintiffs went to sleep on their rights … On the part of the plaintiffs they had been too amenable towards the defendants for reasons best known to them. It is therefore sad to find having given so much leeway it behoves upon the defendants to use now all the technicalities of the law to avoid the payment on the judgment obtained by default in the first place.

Accordingly I should therefore allow the application of the plaintiffs for leave to execute on the judgment pursuant to O 46 r 3 of the RHC in the exercise of my discretion, p 309 (MLJ); p 509 (CLJ).

A [31] The plaintiff in the present case did not sleep on its right but had at all material times defended the judgment thereby showing the intention to execute the judgment and thus the defendants cannot be found to say that they would be prejudiced in any way, p 309 (MLJ); p 509 (CLJ).

[32] The plaintiff submitted that the defendants in the present case could not rely on the Limitation Act 1953 since it is the defendants' action in taking the appeal up to the Federal Court and that the first defendant intentionally took a lengthy time to dispose the Suit No D4–22–1693–2000 and have its appeal heard at the Court of Appeal after a period of almost six years that had induced the plaintiff to delay the execution proceeding of the judgment, p 309 (MLJ); p 509 (CLJ).

C **[31]** However that was a case where six years had lapsed from the date of the judgment but before the expiry of 12 years. Hence the court there has a discretion to allow leave having been satisfied that there were cogent reasons for so doing. Indeed the plaintiff has not been able to refer to any case where even after 12 years have lapsed, leave has been given to a judgment creditor to proceed with execution on a judgment.

[32] In the present case the period of 12 years from the date of the judgment has lapsed by some four years making a total of 16 years delay with no extenuating circumstance to justify the excuse of not enforcing the judgment earlier within the 12 years period.

[33] Learned counsel for the defendant Mr Adam Teoh referred the court's attention to the case of *Tan Kok Chuan v Liew Nam Foong* [2000] MLJU 76 where the dicta of Lord Selborne on laches in *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at p 239 as succinctly stated was set out as follows:

> The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as an equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material.

H **[34]** Here it is obvious that the plaintiff through its apathy has allowed time to pass by to its detriment when s 6(3) of the Limitation Act 1953 gives more that ample time to it to pursue any and all appropriate modes of execution against the defendant. The sword of Damocles should not be allowed to hang forever above the head of the defendant when he can certainly be set free under the same s 6(3) of the Limitation Act 1953.

PRONOUNCEMENT

[35] For the reasons given above, the application of the defendant to set aside

the ex parte leave granted to the plaintiff to proceed with execution of the judgment after 16 years was allowed. I exercised my discretion that each party should bear its own costs.

Defendant's application allowed.

Reported by Kohila Nesan